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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT RANGEL, Defendant and Appellant.	B205365 (Los Angeles County Super. Ct. No. NA073451)

APPEAL from a judgment of the Superior Court of Los Angeles County, James B. Pierce, Judge. Affirmed.

Nicolas J. Estrada for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven E. Mercer and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Robert Rangel appeals from the judgment entered following his plea of no contest to possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)).[1] Rangel was sentenced under the Three Strikes law to a term of two years, eight months in prison. He contends the trial court erred by denying his *Sumstine* motion[2] to strike a prior felony conviction, brought on the ground his plea in a prior case was not knowing, intelligent, and voluntary. Discerning no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*[3]

On February 15, 2007, officers searched a San Pedro apartment pursuant to a warrant. An officer discovered a semiautomatic firearm beneath a bed. Rangel's California identification card was in a dresser in the same room. Rangel admitted purchasing the gun a few days earlier and placing it under his mattress. He had suffered a 2004 conviction for making terrorists threats (§ 422) and a 1998 conviction for inflicting corporal injury upon a spouse (§ 273.5, subd. (a)), both felonies.

2. *Procedure.*

Rangel was charged with possession of a firearm by a felon (§ 12021, subd. (a)(1)). The information further alleged that he had suffered prior convictions, including the 2004 conviction for making criminal threats (§ 422), a serious or violent felony within the meaning of the Three Strikes law (§§ 667, subds. (b) – (i), 1170.12, subds. (a) – (d)). The trial court denied Rangel's motion to strike the 2004 conviction. Rangel pleaded no contest to the charge and admitted the prior conviction allegation as part of a negotiated disposition. The trial court sentenced him to a term of two years, eight months

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[1] All further undesignated statutory references are to the Penal Code.

[2] *People v. Sumstine* (1984) 36 Cal.3d 909.

[3] Because Rangel pleaded no contest to the charge, the facts have been taken from the transcript of the preliminary hearing.

in prison. It imposed a restitution fine, a suspended parole restitution fine, and a court security assessment. Rangel appeals.

DISCUSSION

The trial court properly denied Rangel's Sumstine motion to strike the 2004 conviction.

a. *Additional facts.*

In 2004, Rangel pleaded guilty to making criminal threats. Before his no contest plea was taken in the instant matter, Rangel moved to strike his 2004 conviction pursuant to *People v. Sumstine, supra,* 36 Cal.3d 909.[4] He urged that his 2004 conviction was constitutionally infirm because his guilty plea had not been knowing, voluntary and intelligent, in that he had had been inadequately advised of the penal consequences of his plea.

The trial court conducted a brief hearing at which Rangel testified, as follows. He was represented by an attorney at the 2004 plea proceeding. When his guilty plea was taken, the district attorney advised that conviction of the charge "*could* increase any future sentence you may receive" but did not explain that any future sentence *would* be doubled under the Three Strikes law. (Italics added.) Rangel had not understood that if he committed a new crime he could be subjected to a greater penalty. Instead, he simply followed his counsel's advice to " 'just say yes.' " Had Rangel known a future sentence would be doubled due to his 2004 conviction, he would not have pleaded guilty.

Based on this testimony, as well as the transcript of the 2004 plea proceeding,[5] defense counsel argued that Rangel's 2004 plea was not intelligent and voluntary. He

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[4] In their briefing, the People refer to the motion at issue as a "*Romero*" motion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) The trial court referred to the motion as both a *Romero* motion and as a motion to set aside the plea. However, Rangel did not seek to have the prior conviction stricken in furtherance of justice (§ 1385), but instead contended it was "constitutionally invalid." Thus, the motion sought to have the prior conviction stricken under *Sumstine* rather than *Romero.*

[5] Rangel has neglected to include the transcript of the 2004 plea proceeding in the record on appeal, although it was apparently before the trial court. We accept, for

urged that, because use of the 2004 conviction to enhance future punishment was a certainty, rather than a probability, the district attorney should have informed Rangel the conviction "would" result in an enhanced sentence for any future conviction, rather than stating it "could" do so.

The trial court denied the motion to strike the prior conviction. It concluded that the district attorney's use of the word "could" was proper, because it was not certain that Rangel would re-offend or that any future sentence would be doubled pursuant to the Three Strikes law.

b. *Discussion.*

Rangel contends the trial court erred by denying his motion to strike the 2004 conviction. He renews his argument that because the district attorney in the 2004 plea proceeding stated his future sentences "could," rather than "would," be enhanced due to the conviction, he was misinformed about the consequences of his plea. Thus, he theorizes, his 2004 plea was neither intelligent nor voluntary and use of the conviction to subject him to sentencing under the Three Strikes law is constitutionally impermissible. We disagree.

First, the People argue that by entering a plea of no contest in the instant matter, Rangel waived any right to challenge the 2004 conviction in his current appeal. The People appear to be correct. (*People v. LaJocies* (1981) 119 Cal.App.3d 947, 956 [the defendant's "guilty plea in the present action precludes her challenge to the prior conviction on appeal"].)

But apart from the question of waiver, it is clear Rangel's contention lacks merit. When sentencing a defendant, a trial court "may not rely on a prior felony conviction obtained in violation of the defendant's constitutional rights." (*People v. Allen* (1999) 21 Cal.4th 424, 429.) In *Boykin v. Alabama* (1969) 395 U.S. 238, 243, the United States Supreme Court held that a defendant seeking to plead guilty is denied due process under

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purposes of this appeal, Rangel's testimony that he was informed at the plea proceeding that a guilty plea "could" increase any future sentence.

the federal Constitution unless the plea is voluntary and knowing. (*People v. Mosby* (2004) 33 Cal.4th 353, 359; *People v. Allen, supra,* at p. 434; *People v. Green* (2000) 81 Cal.App.4th 463, 466.) To ensure the plea is made voluntarily and intelligently, the record must show the defendant was advised of his or her rights to trial by jury, to confrontation, and to be free of compelled self-incrimination. (*People v. Allen, supra,* at p. 434.) In the wake of *Boykin,* the California Supreme Court held that each of these three rights "must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea." (*In re Tahl* (1969) 1 Cal.3d 122, 132; *People v. Mosby, supra,* at p. 359.)

In *People v. Sumstine, supra,* 36 Cal.3d 909, the California Supreme Court held that, as a judicially created rule of criminal procedure, a defendant may, in the present trial, collaterally attack the validity of a prior felony conviction on the ground he was not advised of, or did not knowingly and voluntarily waive, his *Boykin-Tahl* rights in the prior plea proceeding. (*People v. Allen, supra,* 21 Cal.4th at pp. 426, 430, 435.) Accordingly, "[w]hen a defendant makes sufficient allegations that his conviction, by plea, in the prior felony proceedings was obtained in violation of his constitutional *Boykin-Tahl* rights, the trial court must hold an evidentiary hearing." (*People v. Allen, supra,* at p. 435.) *Allen* observed, however, that "at least in noncapital cases," *Sumstine* "represented the high-water mark in this area of motions to strike," (*People v. Allen, supra,* at p. 431), and its rationale has not been further extended. For example, the United States Supreme Court held in *Custis v. United States* (1994) 511 U.S. 485, 496, that the federal Constitution does not guarantee a criminal defendant the right, in the present trial, to challenge a prior conviction on any ground other than that he or she was denied counsel at the prior plea proceeding. *Garcia v. Superior Court* (1997) 14 Cal.4th 953, held that a defendant may not use a *Sumstine* motion to collaterally attack a prior conviction on the ground he received ineffective assistance of counsel during the prior plea proceeding. (*Garcia, supra,* at p. 966; *People v. Allen, supra,* at p. 434.)

Here, Rangel does not allege that he was denied counsel at the 2004 plea proceeding, nor does he dispute that he was advised of his rights to a jury trial, to confront the witnesses against him, and against self-incrimination. Thus, his claim does not implicate one of the *Boykin-Tahl* rights, and his claim of error cannot properly be raised in a *Sumstine* motion. (*See People v. Allen, supra*, 21 Cal.4th at pp. 426, 435, 439 [*Sumstine* motion involves collateral attack encompassing only an alleged deprivation of *Boykin-Tahl* rights].) Thus, the trial court did not err by denying Rangel's motion.

Moreover, while a defendant must be advised about the direct consequences of the conviction (*People v. Moore* (1998) 69 Cal.App.4th 626, 630), it is settled that a defendant need not be advised of the collateral consequences of a plea. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457; *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1354-1355.) The possibility of enhanced punishment in the event of a future conviction is a collateral, rather than a direct, consequence of the conviction, and a defendant who pleads guilty need not be advised of such a collateral consequence. (*People v. Gurule* (2002) 28 Cal.4th 557, 634 ["the 'possible future use of a current conviction is not a direct consequence of the conviction' "]; *People v. Bernal, supra*, at p. 1457; *People v. Moore, supra*, at p. 630; *People v. Sipe* (1995) 36 Cal.App.4th 468, 479.) A criminal defendant's actual knowledge of the collateral consequences of his or her plea is not a prerequisite to a knowing and intelligent plea. (*People v. Reed* (1998) 62 Cal.App.4th 593, 598.) Therefore, "[a] defendant need not be advised of the possible future use of a conviction in the event the defendant commits a later crime." (*People v. Bernal, supra*, at p. 1457; *People v. Crosby, supra*, at pp. 1355-1356.)

Finally, we do not view the district attorney's statements in the 2004 plea proceeding as either misleading or incorrect. According to Rangel's testimony, the district attorney informed him that his plea in the case "could increase any future sentence you may receive." This was correct. As the trial court pointed out, future enhancement of a sentence was a possibility, not a foregone conclusion, because unless Rangel reoffended, there would be no future sentence to enhance. Moreover, even in

the eventuality of a future conviction, sentencing under the Three Strikes law was not a certainty, in that trial courts retain discretion to strike prior conviction allegations in the interests of justice. (*People v. Superior Court (Romero), supra,* 13 Cal.4th 497.) Nor is there any likelihood Rangel was actually misled. Rangel admitted he understood "could" meant "[t]hat it can happen" or "might happen." It is therefore beyond dispute that Rangel knew when he pleaded guilty in 2004 that his conviction could result in increased punishment in the future. Rangel cites no authority suggesting that a plea is involuntary under these circumstances. The trial court properly denied the motion.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.